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No. 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ROSE STAUB, *Appellant*

v.

CITY OF BAXLEY, *Appellee*

On Appeal From the Court of Appeals of the State of Georgia

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported at 94 Ga. App. 18, 93 S.E. 2d 375 (R. 34-38). No opinions were written by the Superior Court or by the Mayor's Court. An earlier opinion of the Georgia Court of Appeals pertaining to an earlier phase of this proceeding is reported at 91 Ga. App. 650, 86 S.E. 2d 712, and an opinion of the Supreme Court of the State of Georgia in a related proceeding is reported at 211 Ga. 1, 83 S.E. 2d 606.

JURISDICTION

Appellant was charged with and convicted of violating an ordinance of the City of Baxley entitled "An Ordinance To Regulate The Solicitation Of Membership In Organizations Among The Citizens Of City Of Baxley: To Provide For Permits For Persons Or Agents Soliciting Such Members: To Provide For License Fees And For Violation Of This Ordinance" (R. 5, 9-11). The judgment of conviction was entered in the Mayor's Court on March 15, 1954 (R. 5). A petition for certiorari was overruled by the Superior Court, and its judgment, affirming the judgment of conviction, was entered on December 10, 1955 (R. 32). The final judgment of the Georgia Court of Appeals, affirming the judgment of the Superior Court, was entered on April 12, 1956 (R. 39); a motion for rehearing was denied by that court on May 15, 1956 (R. 39); and an application for certiorari was denied by the Georgia Supreme Court on July 11, 1956 (R. 40). Notice of appeal was filed in the Georgia Court of Appeals on October 5, 1956 (R. 40). The jurisdictional statement was filed in this Court on November 29, 1956, and probable jurisdiction was noted on January 14, 1957 (R. 45), 352 U.S. 962. The jurisdiction of this Court to review by appeal the judgment of the Georgia Court of Appeals is conferred by 28 U.S.C. § 1257 (2).[1]

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[1] A municipal ordinance constitutes "a statute of any state" within the meaning of 28 U.S.C. § 1257 (2). *Jamison* v. *Texas*, 318 U.S. 413, 414. State failure or refusal to decide the validity of a state statute, without adequate state ground, is the equivalent of a decision "in favor of its validity" for the purpose of 28 U.S.C. § 1257 (2). *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283.

THE STATUTE INVOLVED.

The ordinance of the City of Baxley, here in issue; adopted on September 17, 1949, and appearing in minute book 3, page 396, of that city; provides as follows (R. 9-11):

> Section I. Before any person or persons, firms or organizations shall solicit membership for any organization, union or society of any sort which requires from its members the payment of membership fees, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to Mayor and Council of the City of Baxley for the issuance of a permit to solicit members in such organization from among the citizens of Baxley.
>
> Section II. Such application shall give the name and nature of the organization for which applicant desires to solicit members, whether such organization is incorporated or unincorporated, the location of its principal office and place of business and the names of its officers, along with date of its organization, and its assets and liabilities. Such application shall further contain the age and residence of applicant including places of residence of applicant for past ten years; and as well as business or profession in which such applicant has been engaged during said time, and shall furnish at least three persons as references to applicant's character. Said application shall also furnish the information as to whether applicant is a salaried employee of the organization for which he is soliciting members, and what compensation, if any, he receives for obtaining members.
>
> Section III. This application shall be submitted to a regular meeting of Mayor and Council of City of Baxley, and in event it is desired by Mayor and Council to investigate further the in-

formation given in the application, or in the event the applicant desires a formal hearing on such application, such hearing shall be set for a time not later than the next regular meeting of the Mayor and Council of City of Baxley. At such hearing the applicant may submit for consideration any evidence that he may desire bearing on the application, and any interested persons shall have the right of appearing and giving evidence to the contrary.

Section IV. In passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley.

Section V. The granting or refusing to grant such application for a permit shall be determined by vote of Mayor and Council, after consideration and hearing if same is requested by applicant or Mayor and Council, in the same manner as other matters are so granted or denied by the vote of the Mayor and Council.

Section VI. In the event that person making application is salaried employee or officer of the organization for which he desires to seek members among the citizens of Baxley, or persons employed in the City of Baxley, or receives a fee of any sort from the obtaining of such members, he shall be issued a permit and license for soliciting such members upon the payment of $2,000.00 per year. Also $500.00 for each member obtained.

Section VII. Any person, persons, firm, or corporation soliciting members for any organization from among the citizens of persons employed in the City of Baxley without first obtaining a permit and license therefor shall be punished as provided by Section 85 of Criminal Code of City of Baxley.

Section VIII. All ordinances of City of Baxley in conflict with ordinance are hereby repealed.

Section IX. Should any section or portion of this ordinance be held void, it shall not affect the remaining sections and portions of same.

QUESTIONS PRESENTED

1. Whether freedom of speech, press, and peaceable ssembly, guaranteed against state infringement by ie Fourteenth Amendment of the United States Con- itution as it incorporates the First Amendment, are ridged by an ordinance which provides that: (1) be- re a person, firm, or organization may solicit citizens the municipality for membership in any organiza- n requiring payment of membership dues or fees, ch person, firm, or organization must first secure permit from the Mayor and the City Council who ay withhold or grant that permit in their discretion sed on their consideration of "the character of the plicant, the nature of the business of the organiza- n for which members are desired to be solicited, and effects upon the general welfare of citizens" of the nicipality; and that, (2) if the person desiring to icit is a salaried employee or officer of the organiza- n for which membership is sought, or receives a fee obtaining members, such person shall, in addition securing a permit, pay a license fee of $2,000 per ar plus $500 for each member obtained.

2. Whether the right of employees to organize and select representatives of their own choosing for the rpose of collective bargaining and other mutual aid protection, safeguarded by the Fourteenth Amend- nt of the United States Constitution against state privation without due process of law, is abridged by

the aforesaid ordinance in that (1) it prohibits solicitation of membership for an organization without a permit and that permit may be withheld by the Mayor and the City Council from any person, firm or organization thought by them in their uncontrolled discretion and without any standards to be unsuitable, and (2) it imposes a prohibitive tax on solicitation by a salaried employee or officer of the organization for which membership is sought or by a person receiving any fee for obtaining members.

3. Whether the aforesaid ordinance denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution in that (1) it singles out for taxation those persons who are salaried employees or officers of the soliciting organization or who receive any fee for solicitation, leaving all others who have received a permit free to solicit without paying the tax, and (2) it imposes a tax on solicitation grossly in excess of taxes imposed on purely commercial activity.

4. Whether the aforesaid ordinance, in prohibiting in the manner described the solicitation of members without a permit and in taxing the solicitation of members, conflicts with Section 7 of the National Labor Relations Act which provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

5. Whether consideration by the Supreme Court of the United States of a challenge to the validity of a

municipal ordinance on federal grounds, where the challenge is to the ordinance on its face, in its entirety, and the bases of its invalidity are fully particularized, may be precluded by the refusal of the state court to entertain the merits of the challenge for the asserted reason that it is procedurally defective in that (1) the "attack should have been made against specific sections of the ordinance and not against the ordinance as a whole", and (2) "no effort" was made "to comply with any section of the ordinance."[2]

STATEMENT

I. When and How the Federal Questions Were Raised

The federal questions presented by this appeal were first raised by appellant in the Mayor's Court of the City of Baxley by a plea in abatement prior to trial (R. 4, 12-15, 26). Exception was taken in that court to its overruling of the plea (R. 4-5, 26). The federal questions were thereafter urged at each succeeding stage throughout the proceedings in the Georgia courts: by certiorari in the Superior Court (R. 6-9); by a bill of exceptions in the Court of Appeals (R. 3); by a motion for rehearing in that court (Tr. 77-93);

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[2] Since this Court noted probable jurisdiction, and did not postpone consideration of the question of jurisdiction to the hearing of the case on the merits (see Rule 16 (4) of the Rules of this Court), it would appear that, at least tentatively, question 5 has been resolved in favor of appellant's position. This question is fully briefed in the jurisdictional statement (pp. 23-31), and the argument there set out, to which the Court is respectfully referred, will not be repeated here. Additional confirmation of appellant's position may be found in decisions rendered by this Court after probable jurisdiction was noted. *Arnold* v. *Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361; *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 254-258.

and by a petition for a writ of certiorari in the Supreme Court (Tr. 107-122).

II. The Facts

The evidence relevant to appellant's conviction for violation of the ordinance of the City of Baxley adduced at the trial in the Mayor's Court shows as follows:

The International Ladies' Garment Workers' Union is a labor organization that requires dues of its members (R. 16).[3] On February 19, 1954, appellant Rose Staub and here companion Mamie Merritt were at a local restaurant in Baxley where they were sought out by the Chief of Police of the City of Baxley (R. 16). Questioned by him, Rose Staub told the Chief of Police that she was employed by the Union, and she and Mamie Merritt both told him that they were in Baxley "going around talking to some of the women to organize the factory workers, * * * to gain membership and gather members for it and hold meetings with them for that purpose" (*ibid.*). He "did not understand that they were collecting money for members at that time from my conversation with them" (*ibid.*). No permit had been issued to Rose Staub or Mamie Merritt, nor had they made application for a permit, as required by the ordinance (R. 23). During their respective terms of office, no one has ever applied to either the Chief of Police or the Clerk of the City Council for a permit (R. 16, 23).

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[3] The Union, headquartered in New York City, has a membership of about 440,000 persons, and has about 450 local unions located throughout the United States. Directory of National and International Labor Unions in the United States, 1955, Bull. No. 1185, U.S. Dept. of Lab., Bur. Lab. Stat., p. 31.

On the same day of the conversation with the Chief of Police, a meeting was held at the home of Mrs. Catherine Taylor, attended by her, Rose Staub, Mamie Merritt, and three others (R. 17, 19-20, 21). Excepting Staub and Merritt, the other four at the meeting "all work in Hazlehurst" but "live in Baxley" (R. 17, 21).[4] According to Mrs. Taylor, Staub and Merritt had asked "that we hold a meeting at my house. They stated that the purpose of the meeting was for getting members for the union. They asked me to get others together" (R. 20). One of the four present stated that she "was interested in knowing what the union would mean to the workers" (R. 22). At the meeting, Staub and Merritt "just told us they wanted us to join the union, and said it would be a good thing for us to do—to join the union, and went on to tell us how this union would help us" (R. 21). They also explained that the membership dues "would be sixty-four cents a week" (R. 17, 20, 22), but that dues were not payable until the plant was organized (R. 25); no money was asked of the persons at the meeting (R. 18). The

[4] The reference to Hazlehurst, although the record is somewhat ambiguous in this respect, is to the plant of the Hazlehurst Manufacturing Company, which Staub and Merritt were seeking to organize, located in Hazlehurst, Georgia, a town neighboring Baxley. The Wage and Hour Administrator has issued learner certificates covering this plant pursuant to Section 14 of the Fair Labor Standards Act. 21 Fed. Reg. 1943, 1944 (1956); 19 Fed. Reg. 7460 (1954); 18 Fed. Reg. 7480 (1953). Since the employees at this plant are thus "engaged in commerce or in the production of goods for commerce" within the coverage of the Fair Labor Standards Act, it is apparent that the plant's operations "affect commerce" within the more inclusive coverage conferred by that term under the National Labor Relations Act. *Kirschbaum* v. *Walling*, 316 U.S. 517, 520-521.

cooperation of the four was invited "to get other girls from up there to join the union," and blank membership cards were offered for that purpose (R. 17-18, 21, 22). Rose Staub explained that the objective sought was to "have enough cards signed to petition for an election * * * with the Labor Board" (R. 25).[5] As none of the four were interested in joining the Union, no membership cards were left with them (R. 18, 19, 20).

On the same day that this meeting was held, a summons was issued by the Chief of Police commanding appellant Rose Staub to "appear before the Police Court of said City [of Baxley] at 7 o'clock P. M. on the 22 day of February, 1954, to answer to the offense of Soliciting Members for an Organization Without a Permit & License" (R. 9). After trial, the Mayor's Court (or the Police Court as it is also called (R. 26)), convicted appellant of violation of the ordinance (R. 5, 26). She was sentenced to thirty days imprisonment in the City Jail or a fine of three hundred dollars (*ibid.*).

Mamie Merritt was tried together with Rose Staub, and she too was convicted and given the same sentence as Rose Staub for violating the ordinance.[6] By agreement of counsel the disposition of the judgment of conviction of Mamie Merritt is to await and conform with the outcome of the instant appeal.

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[5] The reference is obviously to the National Labor Relations Board since Georgia has no comparable state agency.

[6] Transcript of Evidence, Mayor's Court, p. 35, not part of the record in this Court.

III. The Disposition Below of the Federal Questions

When appellant was summoned "to answer to the offense of Soliciting Members for an Organization Without a Permit & License," she instituted a declaratory judgment action in the Superior Court, Appling County, Georgia, requesting annulment of the ordinance on federal and other grounds and praying for a temporary restraint of enforcement of the ordinance pending declaration, and a permanent injunction against its enforcement upon a declaration of invalidity. Dismissal of the action by the Superior Court was affirmed by the Georgia Supreme Court, that court holding that " 'If the ordinance is invalid, by reason of its unconstitutionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation.' " *Staub v. Mayor of Baxley*, 211 Ga. 1, 83 S.E. 2d 606, 608.

Meanwhile, the temporary restraint against prosecution having been denied, the cause proceeded to trial before the Mayor's Court. In that court, as stated (*supra*, p. 7), the federal questions presented by this appeal were first raised by a plea in abatement prior to trial, and exception was taken in that court to its overruling of the plea. The federal questions were renewed on appeal to the Superior Court from the judgment of conviction (*supra*, p. 7). That court dismissed the appeal without considering the merits (R. 2, 33), holding in accordance with the City's contention that the appeal was improperly perfected in that the certiorari bond had been approved by and filed with the wrong City official (R. 26). It so held despite the clear showing that this had been brought about by knowing misrepresentations of the City's officials (R. 27-31). On appeal from that determina-

tion, the Georgia Court of Appeals held that the bond had been "properly approved and certified" and directed that the case "be returned to the superior court for decision on its merits." *Staub* v. *Baxley*, 91 Ga. App. 650, 86 S. E. 2d 712, 715. On the remand, issue having been joined by the City's denial "that the ordinance is invalid or void for any of the reasons stated" by appellant (R. 26), the Superior Court affirmed the judgment of conviction (R. 32).

On the second appeal to the Georgia Court of Appeals, that court declined to consider the merits in any respect, holding that "it is not necessary to pass upon the sufficiency of the evidence, the constitutionality of the ordinance, or any other phase of the case . . . " (R. 38). It grounded this determination on its view that: (1) appellant "in each instance attacks the ordinance as a whole. The attack should have been made against specific sections of the ordinance and not against the ordinance as a whole" (R. 37); and (2) appellant "made no effort to secure a license" (R. 38). A motion for rehearing was denied by the the Court of Appeals and an application for certiorari was denied by the Georgia Supreme Court (*supra*, p. 2).[7]

SUMMARY OF ARGUMENT

The ordinance challenged here conditions the solicitation of membership in a labor organization upon securing a permit, the grant or denial of which is within the discretion of the municipality, and upon payment of a flat license tax. It is typical of a great and growing number of such ordinances. The ordinance is

[7] With respect to the state court's declination to reach the merits of the federal questions presented, see supra, p. 7 n. 2.

invalid because it abridges the exercise of the rights of speech, press, and assembly, because it offends due process, because it denies the equal protection of the laws, and because it is incompatible with the National Labor Relations Act.

I

The ordinance conditions the solicitation of membership in a labor organization—and thus the exercise of the rights of speech, press, and assembly which is inseparable from it—upon securing a permit from the Mayor and Council of the City of Baxley who may grant or withhold the permit in their discretion based on their consideration of "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley" (*supra*, p. 4). This constitutes previous restraint in its most vicious and primitive form. *Lovell* v. *Griffin*, 303 U.S. 444, 450-452. For here, as in *Largent* v. *Texas*, 318 U.S. 418, 422, "Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form."

The ordinance does not stop with censorship. It further provides that, if the person who would solicit members is a "salaried employee or officer of the organization," or receives "a fee of any sort from the obtaining of such members," he must, in addition to securing a permit, pay an annual tax of $2,000 plus "$500.00 for each member obtained" (*supra*, p. 4). This annual flat tax is fixed in amount, unrelated to the scope of the activity, without basis either in present or potential revenue, and unapportioned

in any way. "It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 114. "In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression." *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinions in *s. c.*, 316 U.S. 584, 611.

Its character as a flat license tax alone vitiates the levy imposed by the ordinance. But the tax is also prohibitive and discriminatory, and for these additional reasons cannot survive the First Amendment's guaranty against abridgement of the freedoms of speech, press, and peaceable assembly.

II

Quite aside from the constitutional protection which solicitation of membership in a labor organization enjoys because of its First Amendment attributes, it derives additional protection from the due process provision of the Constitution. The right of employees to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and otherwise to engage in concerted activity for mutual aid or protection, is a "fundamental right" which exists independently of statutory conferment. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34. The ordinance curtails, indeed suppresses, the exercise of the "fundamental right" to solicit membership in a labor organization in a manner offensive to due process.

The ordinance restricts the right to engage in organizational activity to those persons, firms or organizations whom the Mayor and the City Council in their uncontrolled discretion and without any standards deem suitable. To engage in organizational activity cannot be a "fundamental right" and at the same time subject to governmental constraint which knows no bounds except the individual official's sense of self-restraint.

The tax imposed by the ordinance, apart from its invalidity as a flat license tax regardless of amount, is so exorbitant that it has the effect of prohibiting solicitation of members by all persons who are paid for the work, whether employed at it full or part-time, and by all officers of the organization, whether paid or not. Directed thus at those who are the effective exponents of the organization, the ordinance requires of each of them a $2,000 annual tax plus an additional $500 for each member obtained.

Solicitation of members is to a union "what breathing is to a human being." *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 722. To prohibit it, as this tax effectively does, is to kill unionization. "The power to tax is not the power to destroy while this court sits." Mr. Justice Holmes in *Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218, 223.

III

In addition to the invalidity of the tax for the separate reasons that it is a flat license tax and it is prohibitive, the tax imposed by the ordinance is also discriminatory. While a "state has a broad discretion in classification," the "constitutional guaranty of

equal protection of the laws is interposed against discriminations that are entirely arbitrary." *Smith* v. *Cahoon*, 283 U.S. 553, 566-567. The discrimination worked by the ordinance is without rational basis in at least two respects. First, the tax imposed is grossly in excess of taxes which the City of Baxley levies on business enterprises engaged in purely commercial activity for profit. Secondly, the ordinance requires a permit of all who would solicit members. But it imposes the tax only on those persons who are paid for the work, whether employed at it full or part-time, and by all officers of the organization, whether paid or not. But there is nothing either in their compensation or in what they do that provides a rational basis for this differentiation. The tax imposed bears no conceivable relationship to the compensation received. And to base the exaction on what these persons do—soliciting membership—is to identify the very reason that the classification is invalid.

IV

The ordinance is incompatible with the guarantee of Section 7 of the National Labor Relations Act that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

A. In *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105, this Court held that an employer may, if he does not discriminate, close his property to non-employee organizers, but only "if reasonable efforts by the union through other available

channels of communication will enable it to reach the employees with its message" (*id.* at 112), "such as [by] the mail, telephones, as well as [at] the homes of the workers . . ." (*id.* at 107). The ordinance, however, closes every means of communication to every one save only as the Mayor and the City Council choose to open them to those they approve. It clogs the very interchange which the National Act contemplates shall be free.

B. The soliciting of membership in a labor organization is the preliminary but indispensable step to the designation of the union as the bargaining representative by a majority of employees in the appropriate unit. The ordinance undercuts the "full freedom"[8] of employees to make their selection by confining the appeals to which they may listen to those made by "persons, firms or organizations", if any, whom the Mayor and the City Council approve. But "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications." *Hill* v. *Florida*, 325 U.S. 538, 541.

C. "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.'" *Hill* v. *Florida*, 325 U.S. 538, 542. If ordinances of the type in this case are permitted to stand, the erosion from 48 *state* enactments will seem as nothing compared to the crazy quilt which would be pro-

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[8] Title I, sec. 1, para. 5, Labor Management Relations Act, 1947.

duced by the multiplicity of ordinances spawned by town after town within a state.

D. The tax imposed by the ordinance is levied for engaging in the solicitation of membership. The activity subjected to the tax is conduct protected by the National Labor Relations Act. A state may not burden by a fixed-sum license tax activity safeguarded by Congress pursuant to its exercise of its power to regulate interstate commerce. In addition, the same reasons which make this tax offensive to the First and Fourteenth Amendments show that it is incompatible with the National Labor Relations Act.

ARGUMENT

The ordinance challenged here conditions the solicitation of membership in a labor organization upon securing a permit, the grant or denial of which is within the discretion of the municipality, and upon payment of a flat license tax. We shall show that (1) the ordinance abridges the exercise of the rights of speech, press, and assembly, (2) the ordinance offends due process, (3) the ordinance denies the equal protection of the laws, and (4) the ordinance is incompatible with the National Labor Relations Act. We attempt to marshal under the separate headings appropriate to each contention the particular considerations which appear to be most relevant to it. In a larger sense, however, the considerations are not separable, and it is almost literally true that each factor which bears upon one subject bears also upon every other. It is all one ball of wax.

I. THE ORDINANCE ABRIDGES THE RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT, AS IT INCORPORATES THE FIRST AMENDMENT, BY MAKING THE EXERCISE OF THE FREEDOMS OF SPEECH, PRESS, AND ASSEMBLY DEPENDENT UPON SECURING A PERMIT WITHIN THE DISCRETION OF THE MUNICIPALITY TO WITHHOLD AND UPON PAYING A FLAT LICENSE TAX.

Solicitation of membership in a labor organization embraces each of the cognate freedoms of speech, press, and peaceable assembly. It is carried on by such means as "personal contacts on streets or at home, telephones, letters or advertised meeting. . . ." *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105, 111. In this case a home meeting was held and a discussion of the desirability of joining the Union took place. "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas* v. *Collins*, 323 U.S. 516, 532. And as often happens, literature may also be distributed to persuade employees to join unions, thereby bringing freedom of press into play.

The ordinance in this case suffers from the twin infirmities of making the exercise of these freedoms "dependent on a flat license tax . . . [and a] permit to be issued by an official who could deny it at will." *Marsh* v. *Alabama*, 326 U.S. 501, 504.

A. The Requirement of a Permit

The ordinance conditions the solicitation of membership in a labor organization—and thus the exercise of the rights of speech, press, and assembly which is inseparable from it—upon securing a permit from the Mayor and Council of the City of Baxley who may grant or withhold the permit in their discretion based

on their consideration of "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley" (*supra*, p. 4). This constitutes previous restraint in its most vicious and primitive form. *Lovell* v. *Griffin*, 303 U.S. 444, 450-452; *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinions in *s. c.*, 316 U.S. 584, 600-602. The discretion conferred on the Mayor and City Council in Baxley is as offensive to the First Amendment as was the discretion of the Director of Safety in Jersey City to refuse a permit for use of the streets or parks to hold a public meeting if in his opinion such refusal would prevent "riots, disturbances or disorderly assemblage" (*Hague* v. *Committee For Industrial Organization*, 307 U.S. 496, 514-516); or the discretion of the Chief of Police in Irvington to refuse a permit to a canvasser based on his determination that "the canvasser is not of good character or is canvassing for a project not free from fraud" (*Schneider* v. *Irvington*, 308 U.S. 147, 157-159, 163-165); or the discretion of the Secretary of the Public Welfare Council in Connecticut to withhold a certificate required for the solicitation of money if he is not persuaded that the "cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity" (*Cantwell* v. *Connecticut*, 310 U.S. 296); or the discretion of the Mayor in Paris, Texas, to refuse a permit to "solicit orders for books," to "sell books," or "to canvass," if "after investigation" he deems such refusal "proper and advisable" (*Largent* v. *Texas*, 318 U.S. 418). In this case, as in those, "Dissemination of ideas depends upon the ap-

proval of the distributor by the official. This is administrative censorship in an extreme form." *Id.* at 422.[9]

The length to which the present ordinance goes is manifest from the fact that, unlike the foregoing instances, its application is not even colorably confined to activity on the streets, in parks, or at other public places, to selling or the solicitation of funds, or to house-to-house canvassing. Instead, it invades the very home itself to make it a crime for a guest without a permit to persuade those voluntarily gathered there to join a union. The vice of the ordinance is exposed by appellee in its motion to dismiss the appeal in this Court. Appellee there states that if appellant would but apply for it, a permit would be issued to her, for there is "no question as to the responsibility and integrity of the appellant and the union which she represents" (p. 7). Appellee is thus necessarily asserting the power to withhold a permit if in its view a question of "responsibility and integrity" does exist. So long as the First Amendment stands, a person's right to exercise the freedoms it protects cannot be made to depend on governmental satisfaction with his "responsibility and integrity."

The ordinance in this case applies to *all* persons. But it would be no less offensive if its application were confined to "the individual who . . . in exercising these rights [of speech, press, and assembly] receives compensation for doing so." *Thomas* v. *Collins*, 323 U.S. 516, 531. In our pecuniary society it would strike a fatal blow to the First Amendment if the protection it

[9] See also, *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290.

extends were confined to the unpaid volunteer. Nor does it make a difference that the object is to induce employees to join the Union. The protection of the First Amendment embraces "the opportunity to persuade to action, not merely to describe facts." *Id.* at 537. And the activity is not deprived of its character as speech, press and assembly by calling it "solicitation." *Id.* at 536-537, and concurrence at 546-547.

B. The Imposition of a Flat License Tax

The ordinance does not stop with censorship. It further provides that, if the person who would solicit members is a "salaried employee or officer of the organization," or receives "a fee of any sort from the obtaining of such members," he must, in addition to securing a permit, pay an annual tax of $2,000 plus "$500.00 for each member obtained" (*supra*, p. 4).

Appellee in its motion to dismiss in this Court confesses that "the ordinance requiring large payments of money by paid organizers is unconstitutional . . ." (p. 6). But the vice of the tax goes deeper. It is not the amount alone, but its character as a flat license tax regardless of the amount, which vitiates the levy.

The annual tax imposed is fixed in amount, unrelated to the scope of the activity, without basis in either present or potential revenue, and unapportioned in any way. It is plainly more than a nominal fee to defray the expense of a conceivably valid regulatory scheme. The tax is the same whether the solicitor engages in the taxed activity within the community for one day, one week, or one year; it is the same regardless of the success of the activity; it is the same regardless of the revenue in the form of membership fees which may ultimately be realized from the activity; it

is the same regardless of the solicitor's income from the activity; indeed, an uncompensated officer of the organization must pay the same tax for soliciting as the individual who is paid for it.[10] And as we show hereafter (*infra*, pp. 30-33), the realistic incidence of the tax cannot be measured by considering only its impact on one individual in one community. The tax must be multiplied by the number of individuals in the community who carry on the activity and by the number of communities which have similar taxes to which these individuals may extend their activity.

The flat tax imposed by the present ordinance has therefore precisely the same characteristics as the flat taxes invalidated by this Court in *Murdock* v. *Pennsylvania*[11] and *Jones* v. *Opelika*.[12] In those cases, the tax was imposed on evangelical activity—the distribution of religious literature and personal visitations. In this case, the tax is imposed on the solicitation of membership. In those cases, the highest of the taxes imposed appears to have been $20 for a three-week period of activity;[13] in this case, the tax is $2,000 per year plus $500 for each member obtained. In those cases, as in

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[10] The tax is required of a "salaried employee or officer." Thus, the adjective "salaried" seems to qualify "employee" but not "officer." While it is perhaps possible to interpret the ordinance to apply the qualification of compensation to both the employee and the officer, we believe that the ordinance, fairly read, requires the tax of the uncompensated as well as the paid officer.

[11] 319 U.S. 105.

[12] 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinions in *s. c.*, 316 U.S. 584.

[13] *Murdock* v. *Pennsylvania*, *supra*, 319 U.S. at 106; *Jones* v. *Opelika*, *supra*, 316 U.S. at 592.

this case, the exercise of First Amendment rights constitutes the activity taxed. And so, there as here, "It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 114. "In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression." *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinions in *s. c.*, 316 U.S. 584, 611.

The flat tax is no less offensive because it is levied on the solicitor who is a salaried employee or officer of the organization, or receives a fee for his work. We put aside the fact that the tax is not laid upon compensated solicitation only, but is also levied upon solicitation by an unsalaried officer, for the element of remuneration is beside the point. What is critical is that a person is not stripped of his protection from the imposition of a flat license tax on his exercise of First Amendment rights because he "earns his livelihood" from that exercise. *Follett* v. *McCormick*, 321 U.S. 573, 576-578.[14] The factor of compensation is relevant only to establish a valid basis for nondiscriminatory taxation of income derived from the activity or property used in it.[15] But to say that they like other citi-

[14] And see *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 723: "It is of no consequence in this respect that only those who solicit for compensation are required to pay a tax."

[15] Of course officers, members, and employees of labor organizations pay the same property and income taxes to which all others in the community are subject. And the labor organization itself pays taxes on its property and is subject to a federal income tax on its "unrelated business taxable income." 1954 Internal Revenue Code, §§ 511-514.

zens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege." *Follett* v. *McCormick*, 321 U.S. 573, 578; and see, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250.

Its character as a flat license tax thus alone vitiates the levy imposed by the ordinance. While, as we show hereafter, the tax is also prohibitive (*infra*, pp. 30-34) and discriminatory (*infra*, pp. 34-38), and for these additional reasons cannot survive the First Amendment's guaranty against abridgement of the freedoms of speech, press, and peaceable assembly, it is indispensable to the effective protection of these freedoms to maintain the fundamental position that their exercise under no circumstances provides a valid taxable event. *Grosjean* v. *American Press Co.*, 297 U.S. 233. "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, *supra*, 319 U.S. at 112. "For one reason among others, if the state may tax the privilege it may fix the rate of tax and, through the tax, control or suppress the activity which it taxes." *Jones* v. *Opelika*, *supra*, 316 U.S. at 607. It is no answer to say that the tax rate must constitutionally stop short of prohibition, discrimination, or undue burden. Once granted that the taxing power can within this field be validly exerted to some degree, there is little if any assurance of effective safeguards. *Cf. Grosjean* v. *American Press Co.*, *supra*, at 245.

Evidence of the reality of the danger already exists. An ordinance of the City of Carrollton, Georgia, provided that, in order for a person to act as a "labor union agent, labor union promoter, labor union or-

ganizer," the person was required to secure a license and to pay an annual tax of $1,000 plus $100 for each day of activity.[16] On appeal from the refusal of a United States District Court to exercise equitable jurisdiction in a suit brought to enjoin enforcement of the ordinance, the Court of Appeals for the Fifth Circuit remanded the case to the District Court to determine the merits of the complaint. *Denton* v. *City of Carrollton*, 235 F. 2d 481. The municipality thereafter repealed the ordinance, enacted another in its stead, this time eliminating the daily tax but retaining the $1,000 annual tax.[17] The complaint was then amended to challenge the validity of this ordinance. The District Court again declined to exercise equitable jurisdiction, basing its determination in large part upon the difference in the tax imposed by the new ordinance. *Denton* v. *City of Carrollton*, 32 CCH Labor Cases ¶ 70,850 (N.D. Ga., July 16, 1957).

This concretely illustrates the danger. Unless such taxes, imposed on the exercise of First Amendment rights, are invalidated as flat license taxes regardless of amount, we may confidently expect that litigation, when successful, will result in nothing but repeal or invalidation of the particular ordinance, its prompt reenactment at a reduced rate, and renewed litigation of the new rate. There will be progressive reductions in the tax rates, a merry-go-round of litigation as suits seek to keep pace with experimentation with the rates, and erosion of First Amendment rights in the process.

Accordingly, the ordinance in this case is invalid, both because it conditions the exercise of First Amend-

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[16] Carrollton, Georgia, Nov. 12, 1954, Minute Book 8, Page 477.

[17] Carrollton, Georgia, Oct. 5, 1956, Minute Book 9, Page 139.

ment rights upon securing a permit which is within the discretion of the municipality to grant or withhold, and because it imposes a flat license tax on the exercise of such rights.[18]

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[18] In this Court, as in the court below, appellee may attempt to defend the constitutionality of the ordinance upon the ground that "One of the greatest menaces to our national government is the subversive organizations existing in our midst," and that "An ordinance such as the one here in question, enabling every community to be informed with respect to the character of the organizers and some knowledge of the nature of the organization, will go a long ways towards halting the inroads of subversive organizations." We need not pause to consider by what means, if at all (cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497), a municipality may constitutionally accomplish the stated purpose. It is enough for the present that where a condition exists within the power of the legislature to regulate, but where in conjunction with that condition there also exists occasion for the exercise of First Amendment rights, any legislation directed to the condition must be "narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill* v. *Alabama*, 310 U.S. 88, 105. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U.S. 296, 304. It will not do, as appellee here would, to associate the exercise of First Amendment rights with a condition subject to regulation in order to justify engulfment of the whole. See cases cited *supra*, pp. 19-20, 23. "Surely, this is to burn the house in order to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383.

We cannot forbear mentioning, moreover, that justification of the instant ordinance as a regulation of subversive activity seems the sheerest rationalization, however fashionable. How its serves that end to tax solicitation of membership in *any* organization by paid organizers or officers passes understanding. And if subversive activity is the relevant consideration, we should suppose that at the least the ordinance would have spelled out that factor as the criterion by which to determine whether to grant or withhold a permit, rather than to permit the Mayor and the City Council to roam wholly at large.

II. THE ORDINANCE ABRIDGES THE "FUNDAMENTAL RIGHT" OF EMPLOYEES TO ENGAGE IN ORGANIZATIONAL ACTIVITY WHICH THE FOURTEENTH AMENDMENT SAFEGUARDS AGAINST STATE DEPRIVATION WITHOUT DUE PROCESS OF LAW.

Quite aside from the constitutional protection which solicitation of membership in a labor organization enjoys because of its First Amendment attributes, it derives additional protection from the due process provisions of the Constitution. Evaluated in terms of due process, no less than in the light of the First Amendment, the instant ordinance cannot stand.

The right of employees to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and otherwise to engage in concerted activity for mutual aid or protection, is a "fundamental right" which exists independently of statutory conferment. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 263-264; *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 259. It is safeguarded by the Fourteenth Amendment against state deprivation without due process of law. In addition to the reasons already discussed under the heading of speech, press, and assembly—which in the context of this case establish lack of due process as well—the ordinance in this case offends due process in at least two further respects:

1. The ordinance restricts the right to engage in organizational activity to those persons, firms or organizations whom the Mayor and the City Council in their uncontrolled discretion and without any standards deem suitable. The constitutional vice of this re-

striction has been lucidly stated by the California Supreme Court in *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 719:

> . . . on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guarantees applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity . . . [T]he council members in the exercise of their power might very conceivably conclude that because of an applicant's labor union affiliations or because of his attitude upon controversial labor issues he did not have the prescribed qualities. It is entirely possible that on occasion a majority of the council might be members of a rival labor union or they might be employers engaged in a controversy with the union represented by the applicant. Certainly the standard provided by section 6 of the Redding ordinance is entirely subjective. Each council member is left to determine in his own mind what is "likely" to be the future conduct of the applicant. The character or extent of showing necessary to satisfy the council that the applicant is of good moral character and will not resort to the activities mentioned is not set forth. Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice.

It is plain that the "power given" to the Mayor and City Council of Baxley "is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 366-367. Within our scheme of government there is no "room for the play and action of purely personal and arbitrary power." *Id.* at 370. To engage in organizational activity cannot be a "funda-

mental right" and at the same time subject to governmental constraint which knows no bounds except the individual official's sense of self-restraint.

2. The tax imposed by the ordinance, apart from its invalidity as a flat license tax regardless of amount, is so exorbitant that it has the effect of prohibiting solicitation of members by all persons who are paid for the work, whether employed at it full or part-time, and by all officers of the organization, whether paid or not. Directed thus at those who are the effective exponents of the organization, the ordinance requires of each of them a $2,000 annual tax plus an additional $500 for each member obtained.

The $2,000 annual tax, even if its payment were not required of more than one individual, would alone suppress his engagement in solicitation.[19] But it cannot be so confined. An effective organizational campaign ordinarily requires more than one paid organizer or officer. In this case there were two (*supra*, p. 8). Thus the annual tax must be multiplied by the number of such persons who participate in the campaign in the particular community. It does not stop even there. "It is common knowledge that many of the larger industrial plants . . . are so situated that they draw workers from as many as five or six or more cities." *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 722. Organizers and officers may thus be required to move

[19] The exorbitant nature of this tax is illustrated by the fact that before a *federal* income tax in the amount of $2,000 is payable, even a single person, who does not qualify as a head of a household, must have an adjusted gross income of at least $9,685; a married person with two children filing a joint return must have an adjusted gross income of at least $12,630.

from city to city in any one campaign, and are certainly required to be itinerant where they are engaged in more than one campaign, as they frequently are. Each city may enact a similar tax.[20] Indeed, the evi-

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[20] A random search has uncovered numerous ordinances of the type in this case. Indications are that systematic inquiry would disclose a great many more.

Four ordinances have been found which are indentical to the instant ordinance except for variations in the tax in three and no tax in the fourth. Madison, Florida, Ordinance No. 40, Jan. 24, 1956 ("$300.00 per year, and $25.00 for each member"; invalidated in *Pittman* v. *City of Madison*, 38 LRRM 2567 (Fla. Cir. Ct., July 14, 1956)); Hazlehurst, Jeff Davis County, Georgia, Aug. 5, 1952, Minute Book 4, Page 2 ("$5000.00 per year"); Halifax County, Virginia, Aug. 6, 1956, Minute Book, Page 38 (no tax); Guin, Alabama, May 16, 1955 ($1,000 plus $25 for each member).

Nine have been found which differ in style but not in purport from the instant ordinance; in each the issuance of a license is discretionary and a tax is imposed. Carrollton, Georgia, Nov. 12, 1954, Minute Book 8, Page 477 ($1,000 tax plus $100 for each day of activity. In *Denton* v. *City of Carrollton*, 235 F. 2d 481, the Court of Appeals for the Fifth Circuit remanded the case to the District Court to hear the merits of a complaint challenging the validity of this ordinance. After the remand, the ordinance was repealed, another enacted in its stead, the new ordinance retaining the $1,000 annual tax but eliminating the daily tax. Oct. 5, 1956, Minute Book 9, Page 139); Milledgeville, Georgia ($5,000 annual tax; invalidated in *Starnes* v. *City of Milledgeville*, 15 LLRM 526 (Ga. Super. Ct., Aug. 29, 1944)); Dublin Georgia, April 19, 1956 ($2,500 annual tax; this ordinance also requires an oath forswearing, *inter alia*, communism and belief "in the overthrowing of the municipal or state laws in regard to segregation"); Camilla, Georgia, May 19, 1947, City Code, Section 424, as amended ($1,500 annual tax); Senatobia, Tate County, Mississippi, April 3, 1956 ($1,000 annual tax); Eupora, Webster County, Mississippi, Sept. 4, 1956, Minute Book 9, Pages 167-168 ($1,000 annual tax); Canton, Mississippi, July 3, 1956 ($1,000 annual tax); Newnan, Georgia, May 21, 1956 ($5,000 annual tax,

dence is mounting of a growing tendency by municipal and county governments to impose such taxes (see note 20). The cumulative effect is obviously prohibitive. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115; *In re Porterfield, supra*, 168 P. 2d at 722. The record in this case shows that the working force is drawn from at least two cities, Baxley and Hazlehurst (*supra*, p. 9). Hazlehurst has an ordinance virtually identical to

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plus oath as in Dublin ordinance above); Ashburn, Georgia, Ordinance No. 373, April 5, 1956 ($1,500 annual tax).

The tendency of such ordinances to cluster is illustrated by the three Mississippi ordinances. Each ordinance is identical in wording, enacted within a five-month period, and the cities are all located in Mississippi. This clustering tendency is also markedly illustrated by nine county-wide ordinances enacted in South Carolina, eight of which were adopted within the space of four months from April to July 1957, after this Court noted probable jurisdiction in this case. Barnwell County, South Carolina, Act 997, L. 1956, approved and effective April 5, 1956; Abbeville County, South Carolina, Act 248, L. 1957, approved and effective April 4, 1957; Florence County, South Carolina, Act 340, L. 1957, approved and effective April 27, 1957; Edgeville County, Act 537, L. 1957, approved June 14, 1957, and effective July 4, 1957; Kershaw County, Act 689, L. 1957, approved and effective July 16, 1957; Lee County, Act 477, L. 1957, effective July 5, 1957; Marlboro County, Act 484, L. 1957, effective July 5, 1957; McCormick County, Act 605, L. 1957, approved July 10, 1957, effective July 30, 1957; Williamsburg County, Act 478, L. 1957, effective July 5, 1957. The first cited ordinance is reported in full, and the other eight are summarized, in CCH Labor Law Reporter, South Carolina, ¶ 42,001. Each ordinance conditions solicitation of union membership upon securing a permit, good for sixty days only "after which time it must be renewed if so desired by the applicant." Issuance and revocation of the permit are conditioned as follows:

> The Board of Managers shall have power to revoke any permit upon a showing that the applicant made false statements in obtaining the permit or for any other good and sufficient cause found to exist. The Board shall have power

Baxley's except that the annual tax is $5,000.[21] Appellant would therefore be required to pay an annual tax of at least $7,000, if the ordinances be valid. Finally, the additional tax of $500 for each member obtained without more prohibits solicitation. In this case the weekly dues required of a member are 64 cents, payable only if the plant is organized (*supra*, p. 9). At

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to refuse to issue a permit for any just reason and for the peace and good order of the citizens of Barnwell County. [No tax is imposed.]

Other ordinances impose a tax, some coupled with a registration requirement which may or may not have discretionary elements. Bainbridge, Georgia, April 21, 1953 ($500 annual tax on "Labor Agents" plus registration required for a permit); Madison, Georgia, July 30, 1946 ("$100.00 for the privilege of soliciting membership in, or organizing such [Labor] Unions"); Marianna, Florida, May 9, 1955 ($750 tax on a "Labor Organizer"); Dothan, Alabama, Ordinance No. 1862, Oct. 11, 1955 ("Labor Union Organizers, $50.00"); Russellville, Kentucky, May 8, 1956 ($250 tax on "labor organizer and promoter" and $100 tax on "labor solicitor"; tax required to obtain a license good for the period from issuance to succeeding April 30th; license will issue "if the application gives correctly the information required"; license revocable if the application contains "false information" or the licensee is convicted of a felony; invalidated in *United Steelworkers* v. *Fuqua*, 40 LRRM 2241 (D.C.W.D. Ky., June 10, 1957)); Cullman, Alabama, Ordinance No. 461, June 24, 1957 ("initial license fee" of $750, plus information required including whether applicant has been convicted of a felony, its nature, and whether the applicant is or has been a member of the Communist Party or an affiliated organization).

Many of the ordinances also contain an age and residence requirement. Typical is the Dublin ordinance, paragraph 3 above, which provides that "no person shall be granted a license . . . unless said applicant is over 21 years of age; of good moral character; and shall have been a resident of the City of Dublin for a period of more than five years. . . ."

[21] See paragraph 2 of preceding note.

this rate, a person would have to be a dues-paying member for 15 years before the initial $500 outlay were recovered, without counting the intervening cost of providing service for that member.

Solicitation of members is to a union "what breathing is to a human being." *In re Porterfield, supra,* 168 P. 2d at 722. To prohibit it, as this tax effectively does, is to kill unionization. "The power to tax is not the power to destroy while this court sits." Mr. Justice Holmes in *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, 223.

III. THE TAX IMPOSED BY THE ORDINANCE IS BASED ON A DISCRIMINATORY CLASSIFICATION AND THEREFORE OFFENDS THE CONSTITUTIONAL GUARANTY OF EQUAL PROTECTION OF THE LAWS.

In addition to the invalidity of the tax for the separate reasons that it is a flat license tax and if is prohibitive, the tax imposed by the ordinance is also discriminatory. While a "state has a broad discretion in classification," the "constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." *Smith* v. *Cahoon,* 283 U.S. 553, 566-567.[22] Classification in exercising the power to tax, as in any other exertion of governmental authority, must be " 'based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' " *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389, 400. The tax imposed by the ordinance in this case is discriminatory in this sense in at least two respects:

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[22] See also, *Skinner* v. *Oklahoma,* 316 U.S. 535; *Hale* v. *Bimco Trading Inc.,* 306 U.S. 375; *Morey* v. *Doud,* 1 L. Ed. 2d 1485.

1. The annual tax of $2,000 plus $500 for each member obtained is grossly in excess of taxes which the City of Baxley imposes on business enterprises engaged in purely commercial activity for profit. The Clerk of the City Council of Baxley testified as follows concerning "a schedule of license that are charged by the City of Baxley for various businesses" (R. 23):

> The amount of yearly license required for automobile accessories, wholesale and retail, is $100. $150 is the amount charged a bank or banker. For a billiard or pool room, the first table is $100, and $10 each additional table. The book or magazine agent is charged $10 per day. $2 per day is charged for a bill poster and bill cards, and sample advertising matter. $50 is charged for a cafe or restaurant. A carnival tent show is charged $100 per day with the consent of the Mayor and Council. The amount charged to merchants with general and specific stock is broken down into terms of merchandise and it is based on inventory. $150 is charged from $10,000 to $20,000. $100 is charged from $5,000 to $10,000. The regular moving picture show is charged $200 per year.

The vice of the discriminatory levy imposed by the ordinance is emphasized by the force of the observation that "'a labor union is a combination of working men formed, not for the conduct of a lawful business, trade, or profession, for the pecuniary gain of its members; but for the purpose of securing, by united action, the most favorable wages and conditions of labor, and otherwise improving their economic and social status.'" *Deeney* v. *Hotel & Office Employees' Union*, 57 Cal. App. 2d 1023, 1026-1027, 134 P. 2d 328, 330.

2. The ordinance requires a permit of all who would solicit members. But it imposes the tax only on those

persons who are paid for the work, whether employed at it full or part-time, and by all officers of the organization, whether paid or not. But there is nothing either in their compensation or in what they do that provides a rational basis for this differentiation. The tax imposed bears no conceivable relationship to the compensation received. And to base the exaction on what these persons do is to identify the very reason that the classification is invalid.

(a) *Compensation*: That the differentiation cannot rationally rest upon remuneration is evident from the fact that the tax is laid upon solicitation by an officer who is paid nothing. It is also evident from the fact that the tax is laid upon solicitation by a person who receives "a fee *of any sort*" for it. A tax cannot be justified on the basis of compensation when it is imposed indiscriminately on those who are paid nothing or a pittance. Nor is the situation any better when consideration is confined to the full-time paid officer or paid organizer. From no others engaged in full-time gainful employment does the City of Baxley require an annual tax of $2,000. Compensation therefore does not furnish a legitimate distinction.

(b) *What they do*: When we consider what the individuals do of whom the City of Baxley requires an annual tax, we strike to the heart of the reason that they are singled out for taxation, a reason, however, which but demonstrates the invalidity of the classification.

In many local unions, if not indeed in most, the officers of the organization are unpaid, or at best receive nominal sums. Their source of livelihood customarily comes from working full-time in the same plant with

the employees whom the local union represents or seeks to organize. Of course no local union can exist without officers, and a continuing function of such officers is solicitation of members, if for no other reason than that personnel turnover in the plant requires recruitment of the newcomers in order for the organization to remain viable. To tax officers because they solicit members is thus to make it impossible for the union to exist and function. It is, indeed, to make it impossible for the union even to come into being. For while initial organizational impetus may arise among the employees themselves, it very soon requires direction and leadership in order to bring it to fruition. At the moment when, to emerge from embryonic organization, the employees form a union and elect officers, the municipality steps in to exact its tax. To tax the officers at that stage is to still the organization at birth.

The invalidity of the classification is just as apparent when consideration is confined to the full-time paid organizer. "It is axiomatic to say that without members a union can not function. In the development and apposition of a trade union the paid organizer usually has the duty to widely and systematically solicit workers for membership. A tax on solicitation of memberships thus tends to smother the workers' united existence." *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 722.[23] To single out the paid organizer for taxation,

[23] At pp. 29-30 of its brief in *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105 (No. 250, Oct. Term, 1955), the NLRB observed that:

> Both before and after the passage of the Act it has, of course, been common practice for employees to avail themselves of the services of outside organizers. [Citations.] The necessity for invoking such assistance, particularly in the

because it is his job to solicit membership, is thus to state precisely the reason why the tax cannot stand. What appellee has done is to select for taxation those who are the effective exponents of organization and without whom it cannot exist.

IV. PROHIBITION OF SOLICITATION OF MEMBERS WITHOUT A PERMIT AND TAXATION OF SOLICITATION OF MEMBERS CONFLICT WITH THE RIGHTS GUARANTEED EMPLOYEES BY SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT.

Section 7 of the National Labor Relations Act provides that "Employees shall have the right to self-

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light of modern industrial conditions, requires little elaboration. Today, as everyone knows, it is commonly true that effective union organization can be best promoted by persons who devote their full time and knowledge to the task. Cf. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 10. [Citations.] Union representatives who specialize in organization are experienced in organizing techniques and familiar with the complexities of present day labor law. Formal training in organization methods is increasingly an indispensable prerequisite to organizing work. Unions have more and more drawn upon colleges and graduate and law schools for the knowledge and skills required by ambitious organizing campaigns. In addition, the labor movement has developed its own training schools for organizers comparable to the salesmanship training courses of industry and the programs of business colleges and graduate schools. [Citations.] Employees who are unable to tap such organizational know-how gained from long experience or specialized training are manifestly handicapped in exercising their statutory right to self-organization for purposes of collective bargaining. And to the extent that otherwise appropriate channels of communication between employees and such organizers are blocked, as here, the employees' statutory rights are diminished.

The validity of this observation is unaffected by the rejection of the particular position that the NLRB advanced in that case.

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The ordinance in this case conflicts with the National Act in numerous respects (*United Steelworkers* v. *Fuqua*, 40 LRRM 2241 (D.C. W.D. Ky., June 10, 1957)):

1. In *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105, this Court held that an employer may, if he does not discriminate, close his property to non-employee organizers, but only "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" (*id.* at 112), "such as [by] mail, telephones, as well as [at] the homes of the workers . . ." (*id.* at 107). The premise of the decision is that the communications media must be kept open in order to realize the rights conferred by the National Act. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

The ordinance, however, closes every means of communication to every one save only as the Mayor and

the City Council choose to open them to those they approve. It clogs the very interchange which the National Act contemplates shall be free. The "rights guaranteed to employees by the act include full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." *Harlan Fuel Co.*, 8 NLRB 25, 32. These rights cannot be realized so long as the ordinance stands. *United Steelworkers* v. *Fuqua*, 40 LRRM 2241, 2244 (D.C. W.D. Ky., June 10, 1957).

2. The soliciting of membership in a labor organization is the preliminary but indispensable step to the designation of the union as the bargaining representative by a majority of employees in the appropriate unit. The ordinance undercuts the "full freedom"[24] of employees to make their selection by confining the appeals to which they may listen to those made by "persons, firms or organizations," if any, whom the Mayor and the City Council approve. *United Steelworkers* v. *Fuqua*, *supra*. But "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualificatons." *Hill* v. *Florida*, 325 U.S. 538, 541. See also, *United Mine Workers* v. *Arkansas Oak Flooring Company*, 351 U.S. 62.

As the record shows (*supra*, p. 10), the ultimate object of the solicitation in this case was to "have enough cards signed to petition for an election" by the National Labor Relations Board. The incompatibility of the ordinance's restrictions with attainment of that

[24] Title I, sec. 1, para. 5, Labor Management Relations Act, 1947.

end was shown by this Court when it discussed the incidents of an "election for collective bargaining agent . . . ordered by national authority pursuant to the guaranties of national law" (*Thomas* v. *Collins*, 323 U.S. 516, 533-534):

> Those guaranties include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It included, in this case, the right to designate [the Union] . . . or any other, . . . as the employees' representative. It included their right fully and freely to discuss and be informed concerning this choice, privately and in public assembly. Necessarily correlative was the right of the union, its members and officials, whether residents or nonresidents . . . and, if the latter, whether there for a single occasion or sojourning longer, to discuss with and inform the employees concerning matters involved in their choice.

Whether the election has already been ordered, as in *Thomas* v. *Collins*, or is still being sought, as here, the evil of censorship is the same; in either case, it stands athwart the election processes and a free choice.

3. "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.'" *Hill* v. *Florida*, 325 U.S. 538, 542; see also *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 123-124. If the ordinances of the type in this case are permitted to stand, the erosion from 48 state enactments will seem as nothing compared to the crazy quilt which would be produced by the multiplicity of ordinances spawned by town after town or county after county within a state. See *Nippert* v. *Richmond*,

327 U.S. 416, 428, n. 19, 429-430. Workers employed in a single plant, but living in different neighboring towns, would have their choice circumscribed by as many of the different views as the different city fathers entertained; as in this case (*supra*, p. 32), Baxley might bar an organization which Hazlehurst found acceptable.

To permit Balkanization in the establishment of the standards under which the solicitation of membership in labor unions may be conducted is to strike at the very idea of union organization. To render it "at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild." *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209. And so, "elimination of price competition based on differences in labor standards is the objective of any national labor organization." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503.

These truisms have gained rather than lost their relevance with the passage of time. Today the market for goods is increasingly nationwide and industry is increasingly mobile. Places of manufacture change, either because an existing establishment migrates to a new territory, or because, without abandoning the old plant, new installations are constructed in hitherto undeveloped regions. As pastoral areas are industrialized, sectional differences in labor standards develop, with the standards in the new and unorganized place

commonly lower than those which prevail in the older and unionized place. To protect and maintain the higher labor standards, union organization must extend to the new regions to bring them into alignment with the old. That extension is accomplished by having the labor union solicit the membership of the new worker in the new region; the union migrates with the industry; in substance, the older worker in the older region through his union seeks to join hands with the newer worker in the newer region for their common betterment.

The National Labor Relations Act guarantees the right to attempt, and provides the means for achieving, such rapprochement. Ordinances of the type in this case, however, have the necessary effect—indeed, they are designed for the very purpose—of throwing a barrier about the new place to prevent union entry into it.[25] The National Act and such ordinances cannot stand together.

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[25] It is no accident that such ordinances are products of small towns or rural counties, with no tradition or appreciation of union organization and the necessity for it, and in which "legislative action is not likely to be subjected to those political restraints" which would prevent such retrogression (*cf.*, *South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 185, n. 2; *Edwards* v. *California*, 314 U.S. 160, 174). Taken in the order in which the ordinances are listed at pp. 31-33, *supra*, the populations shown by the 1950 Census are as follows: Baxley, Georgia, 3,409; Madison, Florida, 3,150; Hazlehurst, Georgia, 2,687; Halifax County, Virginia, 41,442; Guin, Alabama, 1,137; Carrollton, Georgia, 7,753; Milledgeville, Georgia, 8,835; Dublin, Georgia, 10,232; Camilla, Georgia, 3,745; Senatobia, Missouri, 2,108; Eupora, Mississippi, 1,338; Canton, Mississippi, 7,048; Newnan, Georgia, 8,218; Ashburn, Georgia, 2,918; Barnwell County, South Carolina, 17,266; Abbeville County, South Carolina, 22,456; Florence County, South Carolina, 79,710; Edgeville County, South

4. The tax imposed by the ordinance is levied for engaging in the solicitation of membership in a labor organization. The activity subjected to the tax is conduct protected by the National Labor Relations Act. Every reason which makes this tax an unconstitutional exaction offensive to the First and Fourteenth Amendments (*supra*, pp. 22-26, 30-38) likewise establishes that it is incompatible with the federal statute. Its character as a flat license tax, as well as its prohibitive and discriminatory features, vitiates it when measured by the protection conferred by the statute no less than when gauged by the safeguards guaranteed by the Constitution.

There is, however, a significant element added because a source of right protecting solicitation of membership in a labor organization is the statute. For the activity is safeguarded by the statute pursuant to the exercise by Congress of its power to regulate interstate commerce. A state may not burden such activity by a fixed-sum license tax.

When this Court invalidated the imposition of a flat license tax on the exercise of First Amendment rights, it drew strong support for its conclusion from the fact that it is "the type of flat tax which, when applied to interstate commerce, has repeatedly been deemed by this Court to be prohibited by the commerce clause." *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on

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Carolina, 16,591; Kershaw County, South Carolina, 32,287; Lee County, South Carolina, 23,173; Marlboro County, South Carolina, 31,766; McCormick County, South Carolina, 9,577; Williamsburg County, South Carolina, 43,807; Bainbridge, Georgia, 7,562; Marianna, Florida, 5,845; Madison, Georgia, 2,489; Dothan, Alabama, 28,820; Russellville, Kentucky, 4,529; Cullman, Alabama, 7,523.

rehearing the dissenting opinions in *s. c.*, 316 U.S. 584, 609. A state "may not exact a license tax for the privilege of carrying on interstate commerce *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U.S. 33, 56-58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.* 309 U.S. p. 47, and cases cited." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113. And so, from *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489, through *Nippert* v. *Richmond*, 327 U.S. 416, to *West Point Wholesale Grocery Co.* v. *Opelika*, 354 U.S. 390, this Court has invalidated flat license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. For the character of such a tax—fixed in amount, unrelated to the extent of the activity or the receipts to be derived from it, and unapportioned in any way—makes it an undue and discriminatory burden on interstate commerce, both in its actual and potential impact on it. It is, therefore, incompatible with the power of Congress to regulate commerce among the states. For that power "is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation." *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489, 492. A flat license tax imposed by a state cannot stand if the taxed activity is of the kind where "regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant and retaliatory enactments of forty different states." *Id.* at 498. And the mischief is "magnified many times by . . . municipal taxes laid in succession" by town after town. *Nippert* v. *Richmond*, 327 U.S. 416, 429-430.

As a state may not burden the solicitation of orders for the purchase of goods to be shipped interstate with a fixed-sum license tax, it follows *a fortiori* that a state may not burden solicitation of membership in a labor organization with a fixed-sum license tax. For Congress has cast the mantle of its protection over the latter activity in pursuance of its power to regulate interstate commerce. While the solicitation of membership does not, like the solicitation of orders, contemplate an interstate movement of goods, that factor is relevant only if the freedom from restraint is predicated upon operation of the commerce clause "by its own force" (*Freeman* v. *Hewit*, 329 U.S. 249, 252); but where, as here, by "implementing legislation" pursuant to the commerce clause Congress has chosen "to enact a nation-wide rule," the two situations are then in *pari materia* (*Id.* at 252-253). In both situations, the activity in question must be free from the burdens of a fixed-sum license tax, for "the subjects of it are national in their character, or admit of only one uniform system, or plan of regulation." *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489, 492.

Solicitation of membership in a labor organization is protected by "federal legislation, administered by a national agency, intended to solve a national problem on a national scale." *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 123. It is a right which cannot exist, equal in its availability throughout the Nation, if its exercise is subject to the hobbling effect of local fixed-sum license taxes. Depending on the tax rate in any particular city, the right may be suppressed altogether, or at the least it may be restricted to those who can afford the luxury of exercising it. As between communities, exercise of the right may

be free to the inhabitants in one place, expensive in another, and prohibitive in a third. It is inevitable that the national uniformity which Congress sought[26] cannot exist. *United Steelworkers* v. *Fuqua*, 40 LRRM 2241, 2244 (D.C. W.D. Ky.; June 10, 1957).

But "Congress occupied this field and closed it to state regulation." *International Union* v. *O'Brien*, 339 U.S. 454. 457. The burden of local intervention "is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense." *Freeman* v. *Hewit*, 329 U.S. 249, 252-253. Taxation is, on the contrary, more ominous than regulation. *Id.* at 253-254. Where, as here, the activity protected by Congress may not be prohibited or fettered by local regulation (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62), it may *a fortiori* not be burdened by local imposition of a fixed-sum license tax.

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[26] ". . . Congress has expresssed its judgment in favor of uniformity." *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 10-11.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed.

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